IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

U.S. DISTRICT COURT
FILED AT WHEELING, WV

SEP 23 2010

NORTHERN DISTRICT OF WV
OFFICE OF THE CLERK

(Wheeling Division)

CHARLES C. CUMPTAN and
DEBORAH V. CUMPTAN,

Plaintiffs,

CIVIL ACTION NO.: 5:10-CV-00012

VS.

(Removed from Circuit Court of
Marshall County, West Virginia)

ALLSTATE INSURANCE COMPANY,
and LARRY D. POYNTER,
individually, and ED STEEN,
individually,

Defendants.

DEFENDANT ALLSTATE INSURANCE COMPANY'S SURREPLY OPPOSITION TO PLAINTIFFS' MOTION TO REMAND

COMES NOW the Defendant, Allstate Insurance Company, hereinafter referred to as "Allstate," by and through its counsel, Walter M. Jones, III, Michael M. Stevens and Martin & Seibert, L.C., and respectfully submits the following Surreply in opposition to Plaintiff's Motion for Remand.

I. PLAINTIFFS WAIVED ANY ARGUMENT ON THE DOUBLE DISMISSAL POINT, AND, EVEN IF ALLOWED TO RAISE IT, THEY MISSTATE THE LAW ON THE "TWO DISMISSAL RULE."

Plaintiffs' reply brief argument regarding the double dismissal rule should not even be considered by this Court. As set forth in Allstate's opening brief (at p. 4), plaintiffs have ***waived*** any argument on the double dismissal point by not raising it in their original remand papers. *See, e.g., Affholder, Inc. v. North American Drillers, Inc.*, 2006 WL 3192537, *16 n. 15 (S.D. W. Va. Nov. 1, 2006) (refusing to consider argument raised for the first time in reply brief). Plaintiffs do not even attempt to dispute Allstate's waiver argument, but ignoring that law does not change its applicability here. Having waived any argument on this issue, they should not be permitted to argue this point in their reply brief for the first time.

In any event, if this Court does consider their belated argument, plaintiffs misstate the law regarding the double dismissal rule. As discussed in detail in Allstate's removal notice (at ¶¶ 31-39), plaintiffs' lawsuit against the non-diverse Adjuster Defendants is barred by the "two dismissal rule," which allows a plaintiff to re-file the same claim following a voluntary dismissal only once before attaching prejudice to the action. *See, e.g., Manning v. South Carolina Dep't of Highway & Pub. Transp.*, 914 F.2d 44, 47 (4th Cir. 1990); *Wahler v. Countrywide Home Loans, Inc.*, 2006 WL 2882495 (W.D.N.C. Oct. 5, 2006) (same principle); *Gabhart v. Craven Regional Med. Ctr.*, 73 F.3d 357, 1995 WL 764240 (4th Cir. 1995) (unpublished decision) (same principle).

Initially, plaintiffs argue that Allstate and the Adjuster Defendants have implicitly conceded that plaintiffs' first suit, which was settled in 1990, did not arise from the same facts and assert fundamentally the same claims as plaintiffs' other two suits, by virtue of their not seeking dismissal based on the doctrine of accord and satisfaction. (Pl. Br. at 4.) Allstate and the Adjuster Defendants in fact fully plan to move based on the doctrine of accord and satisfaction, among other grounds, on summary judgment if this case survives the simple motion to dismiss grounds Allstate and the Adjuster Defendants have chosen to raise. There is *no* requirement that Allstate or the Adjuster Defendants move on the accord and satisfaction ground, or any other ground, at the dismissal stage.

Moreover, plaintiffs' contention that the two dismissal rule does not apply because the legal claims in their 1990 lawsuit were not identical to those asserted in their subsequent suits against Allstate, and there were no claims asserted against the Adjuster Defendants in the 1990 suit (Pl. Br. at 4), is incorrect. While certain of the causes of action may be different, it is clear that all three lawsuits here arise from the same facts and assert fundamentally the same claims -- *i.e.,* plaintiffs' alleged entitlement to additional UIM benefits, and Allstate's refusal to provide such benefits. Indeed, plaintiffs themselves judicially *admit* (Pl. Br. at 6-7) that their first suit included the stacking issue, which was also included in the latter two suits.[1] This is *precisely* the scenario presented in the above cases in which the courts dismissed a third lawsuit based on the "two dismissal" rule.

That only Allstate, but not the Adjuster Defendants, was named in the original suit also makes no difference. As with the individual defendant in *Manning*, who was not named in the original lawsuit in that case, the legal rights of the Adjuster Defendants, which turn on plaintiffs' alleged entitlement to stacked UIM benefits, were clearly implicated in the original lawsuit. Moreover, like the North Carolina two dismissal rule at issue in *Gabhart,* West Virginia's two dismissal rule does *not* include any requirement that both actions be against the same defendant. Rather, the Rule plainly states that "a notice of dismissal operates as adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of this or any

[1] This admission, of course, only underscores that plaintiffs knew of their alleged causes of action 20 years ago, thus rendering all their claims time-barred.

other state an action *based on or including the same claim.*" *See* W. Va. R. C. P. 41(a) (emphasis added). Because the two dismissals plaintiffs filed were unquestionably "based on or including the same claim," the "two dismissal" rule conclusively bars plaintiffs' current lawsuit against the Adjuster Defendants.

II. PLAINTIFFS' NEW ARGUMENTS ABOUT EXCEPTIONS TO THE NO INTRA-CORPORATE CONSPIRACY DOCTRINE ARE ALSO UNAVAILING.

Plaintiffs also argue, for the first time in their reply, that the no intra-corporate conspiracy doctrine does not apply here based on the exceptions to that doctrine: *i.e.,* (a) the "independent personal stake" exception, when the agent has a personal stake in the alleged illegal activity independent of his relationship with the corporation; or (b) the "unauthorized act" exception, when the agent is alleged to have acted outside the scope of his authority or employment. (Pl. Br. at 11-12.) Plaintiffs again misstate the law because, as set forth in Allstate's remand opposition, neither of these exceptions can possibly apply here. *See, e.g., U.S. v. Gwinn*, 2008 WL 867927 (S.D. W. Va. Mar. 31, 2008).

The "independent personal stake" exception does not apply, because plaintiffs do not allege, nor can they, that either of the Adjuster Defendants had a personal stake, independent of their relationship with Allstate; in the alleged wrongful conduct of failure to pay plaintiffs additional UIM coverage. The "unauthorized act" exception also does not apply, because plaintiffs specifically allege the Adjuster Defendants were acting within the scope of their employment when they engaged in the alleged wrongful conduct (Compl., ¶¶ 4-5), and they do *not* allege the Adjuster Defendants were acting outside the scope of their authority or employment. This was exactly the situation that existed in *Gwinn,* where the court *rejected* application of the two exceptions.[2] The other so-called exceptions mentioned by plaintiffs are not authorized by any West Virginia case, and, in any event, were not pled in plaintiffs' Complaint.

CONCLUSION

For all the foregoing reasons, as well as those set forth in Allstate's remand opposition, the Adjuster Defendants are fraudulently joined, so removal was appropriate, and, Allstate respectfully submits, plaintiffs' Motion to Remand should be denied.

ALLSTATE INSURANCE COMPANY
By Counsel

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[2] *See, e.g., Gwinn,* 2008 WL 867927, *25 (noting the "unauthorized act" exception was "not applicable because the Government did not allege in its Complaint that Defendants acted outside the scope of their employment," and that the "independent personal stake" exception did not apply, because: "Where a corporation's success is directly dependent on the agent's success in furthering the illegal activity, the two are directly related and are not 'wholly independent' of one another. If one benefits, so will the other").